No. 86-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The briefs in opposition confirm, as much by what they omit as by what they state, that the requested Writ should issue.

First, respondents ignore that the opinion below construes the term "dealing" in a manner the Board itself has since found contrary to its ordinary meaning. Critical to the decision below is its conclusion that the term "dealing" in the narrow Section 16 exception permits banks to promote initial offerings in the primary market. (Fed. R. Br. 7; BT Br. 12.) Because the term "dealing" is not defined in the Act, however, "the legislative purpose is expressed by the ordinary meaning of the words used." *SIA*, 468 U.S. at 149 (129a). And, as the Board confirmed in an order issued *after* the decision below:

> [I]*n accordance with common industry usage*, the term "dealing" refers to the business activity of holding oneself

> out to the public as being willing to buy and to sell securities as principal *in the secondary market*.[1]

Against this acknowledgment, counsel's argument here that "[n]othing in the ordinary meaning of the phrase 'the business of dealing' suggests a distinction between primary and secondary market activities" (Fed. R. Br. 10), has at best a hollow ring. The Act broadly prohibits banks from selling securities in the primary market. Misreading the term "dealing" to sanction such activities, as the district court recognized, "transform[s] a narrow exception addressed to a completely different activity into an expansive authorization that defeats the prohibition intended." 627 F. Supp. at 702 (56a).[2]

Second, the Board finds it necessary to repeat arguments the Court has already rejected. The Board previously argued that it was "not attempting to 'regulate' " through "administrative line-drawing," but conceded that it had imposed guidelines to limit the activites sanctioned. (Brief for Federal Respondents at 45-47 in *SIA* (No. 82-1766).) The Court rejected those guidelines as impermissible regulation under the Act. (133a.) Once again, the Board claims not to have followed a "regulatory approach" (Fed. R. Br. 16) yet found the activities lawful only in light of the myriad extra-statutory "conditions," "limitations" and "framework" imposed. (SIA Pet. 21-23.) Whatever the label, this sort of regulation was rejected by Congress "when it drafted the statute, and . . . ever since." *SIA*, 468 U.S. at 153 (133a).

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1 *Citicorp, et al.*, 73 Fed. Res. Bull. 473, n.4 (1987) (emphasis supplied), *appeal pending*, *SIA* v. *Board of Governors*, No. 87-4041 (2d Cir. filed May 1, 1987) ("*Citicorp*"); *see also* SIA Pet. 15.

2 The *Schwab* decision relied upon extensively by Bankers Trust (BT Br. 7, 11-15), equally confirms that review is warranted. The marketing activities here, in contrast to the discount brokerage at issue in *Schwab*, involve a promotional service that requires extensive investment counselling and is conducted in the primary market. Also, the bank's profit in this case is based solely on its actual success in promoting "particular" securities, and the activity involves a "distribution plan" by which new issues of securities are sold—factors significantly absent in *Schwab*. *See* 468 U.S. at 217-19 & nn.17, 20.

Third, the Board seeks to minimize the significance of its decision in a manner that actually confirms its importance. The Board contends its ruling is "limited to dealings in commercial paper." (Fed. R. Br. 18.) But because the Act draws no distinctions among the securities it covers, "the logic of the Board's opinion must exempt all [securities] from the prohibition on underwriting by commercial banks" (468 U.S. at 157; 137a)—be they investment securities or speculative stocks. By permitting banks to make "private" offerings of securities, the opinion below allows them to market *any* corporate securities in the manner that now accounts for more than one-third of all new issues of debt and equity sold in this country. (SIA Pet. 10-11.) And, the rationale of the court below already has been extended by the Board to sanction bank securities activities substantially beyond private placements. By a narrow 3-2 vote (Chairman Volcker and Governor Angell dissenting), the Board recently ruled that affiliates of seven of the ten largest banks in the country could, as principals, begin underwriting various corporate securities for the first time since the Glass-Steagall Act was passed. *Citicorp*, 73 Fed. Res. Bull. at 473; *see* SIA Pet. 12.

This case has been litigated for nearly seven years and was before the Board for another two years before that. The issues involved have been fully developed in two trips through the federal court system, during which the securities and banking industries both have participated. It is unlikely in the extreme that any further development in the law will occur which could aid the Court in its review. And, absent action by the Court now, the opinion below almost certainly will impel still further administrative erosion of the Glass-Steagall bar and foster even more litigation as a result.

For the foregoing reasons and those in the Petition for Certiorari, the requested Writ should issue.

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Respectfully submitted,

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